Supreme Court, U.S.
FILED

No. 001644 APR 27 2001

OFFICE OF THE CLERK

In the

Supreme Court of the United States

ALVIN F. LANGFELDT and MARY LANGFELDT,

Petitioners,

v.

GENESIS MEDICAL CENTER,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Iowa

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Is a state law which is arbitrarily and capriciously applied in violation of settled principles of law and contrary to undisputed facts violative of due process and equal protection rights under the Fourteenth Amendment because it unlawfully denies access to the courts.

LIST OF PARTIES

The parties to this proceeding are Petitioners Alvin F. Langfeldt and Mary Langfeldt; and Respondent Genesis Medical Center.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Alvin F. Langfeldt and Mary Langfeldt (hereinafter "Langfeldts") respectfully pray for a Writ of Certiorari to the Iowa Supreme Court issue to review the judgment of the Iowa Supreme Court entered in this case on December 1, 2000.

OPINIONS BELOW

The unpublished Order of the Iowa Supreme Court rendered on December 1, 2000, is attached hereto as Appendix A. Prior thereto, the opinions in this case were the unpublished Decision of the Court of Appeals of Iowa, rendered on September 13, 2000, which is attached hereto as Appendix B; and the unpublished Opinion and Order of the Iowa District Court, Seventh Judicial District, Scott County, rendered on September 15, 1999, which is attached hereto as Appendix C.

JURISDICTION

The Judgment of the Iowa Supreme Court was entered on December 1, 2000. This Judgment is final for purposes of review by this Court. This Petition for Writ of Certiorari has been timely filed within ninety days thereafter (Supreme Court Rule 13.1). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1257(a).

Pursuant to the Proof of Service filed herewith, and pursuant to 28 U.S.C. § 2403(b), a copy of all documents shall be served upon the Attorney General for the State of Iowa. It is Petitioners' belief that the Court has not previously notified the Attorney General of the

State of Iowa that a constitutional question regarding Statute was drawn into question.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of Iowa Rule of Civil Procedure 49(f) are set forth in Appendix D. Relevant provisions of the Fourteenth Amendment are also set forth in Appendix E.

STATEMENT OF THE CASE

Petitioners, residents of Davenport, Iowa, on the Mississippi River, sued in Iowa State Court for medical malpractice. Their malpractice claim involved emergency room admission and subsequent treatment due to a severe heart problem. Both Respondent and Dr. Collins, Petitioners' family cardiologist, were sued. Respondent's counsel participated in both cases. After a request to consolidate the cases was denied, the lawsuit against Respondent was dismissed without prejudice.

The lawsuit against Respondent was then refiled. Respondent's counsel acknowledged receipt of the second complaint. Service of the second complaint against Respondent was held in abeyance while Petitioners and Dr. Collins conducted mediation. The Dr. Collins mediation was successful. At each step, Respondent's counsel and Petitioners' counsel exchanged verbal and written communications about their ongoing mediation and settlement efforts. The parties' effort to mediate was unsuccessful. Then, Respondent, for the first time, raised the issue of Petitioners' compliance with Iowa

Rule of Civil Procedure 49(f). See Appendix D. Rule 49(f) requires service of the complaint within ninety (90) days. Rule 49(f) also directs the court to "direct an alternate time or manner of service" and, upon a showing of "good cause for the failure of service," allows the court to "extend the time for service for an appropriate period." In reviewing the Historical Notes/Comment section of Rule 49(f), the intention of this Rule is specifically set forth: ". . . Ninety days was chosen in order that service would be perfected prior to the issuance of scheduling orders by most courts . . . ." A scheduling order had not been issued in this matter and Respondent was informed of the scheduling hearing.

At the trial court level, the District Court (see Appendix C) found:

> Genesis (Respondent), its insurer, and its attorneys were aware of the Langfeldts' claims as a result of the first lawsuit.
>
> Its attorney was furnished a copy of the second lawsuit when it was filed. The court infers defendant and its insurer were able to timely investigate the claim and prepare its defense.

The District Court, nonetheless, dismissed Petitioners' lawsuit for failing to achieve service within the 90-day time limit. The District Court also held that the undisputed settlement negotiations were not "good cause" for extending the time for service.

The Court of Appeals of Iowa affirmed the District Court's Ruling on September 13, 2000. See Appendix B. The Court of Appeals rejected Petitioners' argument that the delay in service did not prejudice the Respondent, stating:

> The point is not whether Genesis suffered prejudice from the delay in service or whether the delay was intentional, but rather whether the Langfeldts can show justification for the delay. . . . We additionally note that notice of the possibility of a lawsuit is not sufficient; the party being sued must be served with an original notice as required by our rules of civil procedure. *Id.*

The Iowa Supreme Court affirmed the Ruling of the District Court on December 1, 2000.

REASONS FOR GRANTING THE WRIT

1. This case presents an important issue involving the administration of justice. Access to the courts is a fundamental right. *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). Although Rule 49(f) involves a state procedural rule, its application fundamentally affects the administration of justice in not only Iowa, but other states. Other states have similar procedural rules. *See e.g.*, Illinois Supreme Court Rule 103(b). It is unfair to apply state rules of procedure in an arbitrary manner. Doing so precludes citizens from access to the courts.

2. There is a conflict between the states in applying procedural rules similar to Rule 49(f). In *Segal v. Sacco*, 136 Ill.2d 282 (1990), the Illinois Supreme Court construed a similar rule and held that it was an abuse of discretion to dismiss a lawsuit because of a 19-week delay between filing a complaint and accomplishing service of process. Unlike the Iowa courts, the Illinois Supreme Court recognized the important societal values inherent in maintaining reasonable access to the judiciary to resolve disputes. Only this Court can clear up

the uncertainty that exists in the administration of justice. This case presents an appropriate vehicle for ending arbitrary state procedural rules that burden litigants in violation of the Fourteenth Amendment. *See,* point 4, *infra.*

3. Resolution of those issues will help preclude forum shopping. Petitioners live in Davenport, Iowa. Only the Mississippi River separates them from Illinois. A few hundred yards of the Mississippi River should not be the basis for denying them access to the courts. Had they lived in Illinois, the Illinois courts would not have tolerated the arbitrary action now imposed by the Iowa courts. The fortuity of residence should not be used as a predicate for imposing arbitrary rules. Actions by state courts involve state action no less than other state actions. So, too, the Equal Protection Clause requires that the fortuity of the Mississippi River not be used as a basis for denying access to the courts.

4. The decision below conflicts with this Court's decision in *Postal Telegraph Cable Co. v. Newport, Kentucky*, 247 U.S. 464 (1918). In *Postal Telegraph Cable Co.,* this Court established that, even in private litigation, courts may not arbitrarily and capriciously make decisions affecting the lawsuit's outcome in violation of settled principles of law and contrary to undisputed facts. To do so violates the Fourteenth Amendment's due process and equal protection clauses. *See Williams v. Tooke*, 108 F.2d 758, 759 (5th Cir.), *cert. den.*, 311 U.S. 655 (1940)

Here, the facts were undisputed. Respondent was involved in the initial lawsuit. Their counsel received the second lawsuit. Settlement negotiations were ongoing and successful in the related Dr. Collins matter. Peti-

tioners and Respondent tried to settle. The courts below arbitrarily ignored these undisputed facts. The courts below also arbitrarily ignored the mandatory language of Rule 49(f): "shall . . . direct an alternate time or manner of service." That language was not permissive or discretionary. The language says "shall . . . direct. . . ." The courts below arbitrarily ignored their own procedural rules. Doing so violated Petitioners' due process rights and conflicts with this Court's earlier decisions.

CONCLUSION

For all of the reasons stated, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

[Filed March 1, 2000]

IN THE SUPREME COURT OF IOWA
No. 99-1626
Scott County No. LACV 93484

ORDER

ALVIN LANGFELDT and
MARY LANGFELDT,

Plaintiffs-Appellants,

vs.

GENESIS MEDICAL CENTER,

Defendant-Appellee.

After consideration by this court en banc, Ternus J., not participating, further review of the above captioned case is denied.

Dated this 1st day of December, 2000.

THE SUPREME COURT OF IOWA

By /s/ Louis A. Lavorato
Louis A. Lavorato, Chief Justice

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APPENDIX B

[Filed September 13, 2000]

IN THE COURT OF APPEALS OF IOWA

No. 0-424/99-1626

ALVIN F. LANGFELDT and
MARY LANGFELDT,

Plaintiffs-Appellants,

vs.

GENESIS MEDICAL CENTER,

Defendant-Appellee.

Appeal from the Iowa District Court for Scott County, David H. Sivright, Jr., Judge.

Alvin and Mary Langfeldt appeal the district court's order dismissing their medical malpractice case against Genesis Medical Center for lack of service. **AFFIRMED.**

Mark F. Cyr of the Law Office of Mark F. Cyr, P.C., Rock Island, Illinois, for appellants.

Charles E. Miller and Troy A. Howell of Lane & Waterman, Davenport, for appellee.

Considered by Huitink, P.J., and Mahan and Zimmer, JJ.

HUITINK, P.J.,

I. Background Facts and Proceedings.

This is the second lawsuit Alvin and Mary Langfeldt filed against Genesis Medical Center. Both are prem-

ised on allegations of medical negligence and resulting injury to Alvin while he was undergoing treatment at Genesis in July 1995. Langfeldts' first lawsuit was filed on July 3, 1997. Genesis's motion to dismiss Langfeldts' claims based on a 117-day delay in service of the required original notice was denied. After the district court also denied Langfeldts' motion to sever their claims against Genesis from that made against Alvin's treating physician, Langfeldts voluntarily dismissed their claim against Genesis.

The second lawsuit resulting in these proceedings was filed on January 28, 1999. On June 17, 1999, Genesis moved to dismiss citing Langfeldts' failure, without good cause, to serve Genesis with an original notice within the time required. Langfeldts conceded failure to serve the original notice as required but claimed ongoing settlement negotiations with counsel for Genesis provided good cause for their failure to do so.

The district court rejected Langfeldts' good cause theory stating:

> In this case, Genesis, its insurer, and its attorneys were aware of the Langfeldts' claims as a result of the first lawsuit. Its attorney was furnished a copy of the second lawsuit when it was filed. The Court infers defendant and its insurer were able to timely investigate the claim and prepare its defense. Nonetheless, plaintiffs have failed to show good cause for their failure to serve defendant in this action as required by amended Rule 49(f). The efforts to mediate settlement with Dr. Collins, and thereafter initiate settlement negotiations or mediation of the claim against Genesis, is not a sufficient reason for delaying service. . . . In addition, it was not

defense counsel's duty or obligation to require "formal" service of process upon Genesis.

Genesis's motion to dismiss was accordingly granted.

On appeal, the Langfeldts contend the district court erred in dismissing their claim. They argue the record demonstrates good cause for their failure to timely serve an original notice. They also agree the delay in service of the original notice did not prejudice Genesis.

II. Standard of Review.

We review the district court's granting of a motion to dismiss for errors of law. *Sanford v. Mantemach*, 601 N.W.2d 360, 363 (Iowa 1999).

III. The Merits.

Iowa Rule of Civil Procedure 49(f) provides:

> If service of the original notice is not made upon the defendant, respondent, or other party to be served within 90 days after filing the petition, the court, upon motion or its own initiative after notice to the party filing the petition, shall dismiss the action without prejudice as to that defendant, respondent, or other party to be served or direct an alternate time or manner of service. If the party filing the papers shows good cause for the failure of service, the court shall extend the time for service for an appropriate period.

Good cause means:

> [t]he plaintiff must have taken some affirmative action to effectuate service of process

> upon the defendant or have been prohibited, through no fault of his [or her] own, from taking such an affirmative action. Inadvertence, neglect, misunderstanding, ignorance of the rule or its burden, or half-hearted attempts at service have generally been waived as insufficient to show good cause.

Henry v. Shober, 566 N.W.2d 190, 192-93 (Iowa 1997). A lengthy delay in service is also indicative of a plaintiff who has filed a petition "not to seriously institute litigation, but rather to 'ice' the statute of limitations for a later determination on whether to proceed with suit." *Alvarez v. Meadow Lane Mall Ltd. Partnership*, 560 N.W. 2d 588, 591 (Iowa 1997).

Applying these principles to the undisputed facts in this case, we find the district court properly concluded the Langfeldts' failure to serve an original notice for 140 days was presumptively abusive. *Cf. Turnbull v. Horan*, 522 N.W.2d 860, 861 (Iowa App. 1994) (finding a 126-day delay in service presumptively abusive). We, like the district court, also conclude the Langfeldts failed to show adequate justification for the delay. Settlement negotiations, even if done in good faith, do not constitute adequate justification or good cause for delaying service. *Henry*, 566 N.W.2d at 193.

Finally, we reject Langfeldts' argument that the delay in service did not prejudice Genesis. The point is not whether Genesis suffered prejudice from the delay in service or whether the delay was intentional, but rather whether the Langfeldts can show justification for the delay. *Mokhtarian v. GTE Midwest Inc.*, 578 N.W.2d 666, 669 (Iowa 1998). We additionally note that notice of the possibility of a lawsuit is not sufficient; the party

being sued must be served with an original notice as required by our rules of civil procedure. *Id.*

The Langfeldts have failed to sustain their burden of showing "good cause" for their failure to comply with Iowa Rule of Civil Procedure 49(f). The district court's dismissal of Langfeldts' lawsuit against Genesis is affirmed.

AFFIRMED.

APPENDIX C

[Filed September 15, 1999]

IN THE IOWA DISTRICT COURT
FOR SCOTT COUNTY

ALVIN F. LANGFELDT and MARY LANGFELDT,	)	
Plaintiffs,	)	No. LACE 93484
vs.	)	RULING ON MOTION TO DISMISS
GENESIS MEDICAL CENTER,	)	
Defendant.	)	

Hearing was held on defendant's motion to dismiss, resisted by plaintiffs. Plaintiffs appeared by their attorney, Mark F. Cyr. Defendant ["Genesis"] appeared by its attorney, Charles E. Miller. The Court having reviewed the pleadings, considered counsel's arguments, and taken judicial notice of Scott County case Number LACE 91174, enters the following ruling.

BACKGROUND FACTS

Alvin and Mary Langfeldt seek damages for personal injuries allegedly caused by the negligent medical treatment of Alvin while he was a patient in the Genesis emergency room in July, 1995. The petition was filed January 28, 1999. Defendant has not been served with original notice.

Plaintiffs' first filed this lawsuit against Genesis Medical Center on July 3, 1997. They were then represented by attorney Jorge Gomez, Jr. The hospital was not served with original notice until October 28, 1997, 117 days after the petition was filed. Defendant's motion to dismiss claiming untimely service pursuant to R.Civ.P. 49 was denied; the Court found service was delayed by a "clerical misunderstanding", was unintentional, and was not prejudicial to Genesis.

Attorney Cyr replaced Gomez as plaintiffs' counsel and sought consolidation of plaintiffs' case against Genesis with their separate negligence action against Dr. John Collins. Both Genesis and Dr. Collins were represented by the same law firm. The Court denied consolidation of the claims, finding the two actions sought damages for different alleged failures to provide adequate medical treatment for different periods of time. The Court also denied plaintiffs' motion for a continuance. Plaintiffs thereafter voluntarily dismissed their first case against Genesis.

This action was filed within six months of plaintiffs' dismissal of their first lawsuit against Genesis and is therefore deemed a continuation of the first case.[1] Defendant moves to dismiss the petition in this case, arguing it has again not been timely served with original notice. Defendant relies upon amended R.Civ.P. 49(f), effective January 24, 1998, which allows dismissal of an action if original notice has not been served within 90 days of the filing of the petition, absent good cause for the delay. The burden is on plaintiffs to show good cause.

---

[1] See Iowa Code Sec. 614.10.

Plaintiffs argue service of notice upon defendant was withheld to allow time to negotiate or mediate their claims against Dr. Collins and Genesis. Plaintiffs have negotiated a settlement with Dr. Collins, and after the filing of this action, attorney Cyr corresponded with defendant's counsel concerning possible settlement or mediation of plaintiffs' claim against the hospital. There is no showing Genesis waived timely service of process, and plaintiffs have not sought any extension of time to complete service.

RULING

Defendant's motion to dismiss plaintiffs' first lawsuit was decided under Rule 49, which prior to January 24, 1998 did not specify a time within which original notice had to be served upon a defendant. However, an action was subject to dismissal if there was "abusive delay" in the completion of service. *Alvarez v. Meadow Lane Mall*, 560 N.W.2d 588, 591 (Iowa 1997). The Court finds amended Rule 49(f) applies here, regardless of the effect of Iowa Code Sec. 614.10. Plaintiffs were required to commence this action within six months of their voluntary dismissal of the first case to have the filing of the first case toll the statute of limitations, but the commencement of this action is subject to the procedural standards in effect at the time the second petition was filed. See generally *Mokhtarian v. GTE Midwest Inc.*, 578 N.W. 2d 666, 668 (Iowa 1998).

Defendant cites *Henry v. Shober*, 566 N.W.2d 190 (Iowa 1977), which upheld dismissal of a cause of action under Rule 49 when the defendant was not served with original notice for reasons similar to those advanced by plaintiffs here. The court noted:

> *. . . settlement negotiations, even if done in good faith, do not constitute adequate justification or good cause for delaying service. Rule 49 contemplates that when a petition is filed, a defendant should be served promptly. (Citation omitted) The existence of ongoing settlement negotiations is not sufficient reason for delaying service. (Citations omitted). . . .*
>
> If we were to allow delays in service for ongoing settlement negotiations, plaintiffs would have no incentive to serve the defendant within a reasonable time. Further, we did not see how service of the original notice and petition is a hindrance to the settlement process. . . . If the parties wish to continue settlement discussion beyond the limitation period, the plaintiff should secure a statute of limitations extentions, in writing from the defendant and the defendant's insurer. *Id.* at 193. (Emphasis added).

In this case, Genesis, its insurer, and its attorneys were aware of the Langfeldts' claims as the result of the first lawsuit. Its attorney was furnished a copy of the second lawsuit when it was filed. The Court infers defendant and its insurer were able to timely investigate the claim and prepare its defense. Nonetheless, plaintiffs have failed to show good cause for their failure to serve defendant in this action as required by amended Rule 49(f). The efforts to mediate settlement with Dr. Collins, and thereafter initiate settlement negotiations or mediation of the claim against Genesis, is not a sufficient reason for delaying service. *Id.* In addition, it was not defense counsel's duty or obligation to require "formal" service of process upon Genesis.

Now, therefore, **IT IS HEREBY ORDERED** that defendant's motion to dismiss is granted. Costs are taxed to plaintiffs.

Dated this 15th day of September, 1999.

/s/ David J. Sivright, Jr.
David H. Sivright, Jr.

JUDGE OF THE SEVENTH
JUDICIAL DISTRICT OF
THE STATE OF IOWA

APPENDIX D

Iowa Rule of Civil Procedure 49(f) provides:

(f) If service of the original notice is not made upon the defendant, respondent, or other party to be served within 90 days after filing the petition, the court, upon motion or its own initiative after notice to the party filing the petition, shall dismiss the action without prejudice as to that defendant, respondent, or other party to be served or direct an alternate time or manner of service. If the party filing the papers shows good cause for the failure of service, the court shall extend the time for service for an appropriate period.

HISTORICAL NOTES

COMMENT

New R.C.P. 49 is a combination of former R.C.P. 49, 50 and 52 to present the information in a more logical sequence. This rule was changed to reflect the present practice. Original notices should now include the telephone number and facsimile transmission number of the party's attorney requesting the issuance of an original notice. It also requires the original notice to have the proper ADA notice. The language is changed stating a default "may be rendered" rather than "will be rendered." This change reflects the actual practice and the 10-day notice before a default judgment can be entered. The rule also has a 90-day requirement for service. Ninety days was chosen in order that service would be perfected prior to the issuance of scheduling orders by most courts. The form of the original notices contained in appendix are changed accordingly.

APPENDIX E

UNITED STATES CONSTITUTION

Fourteenth Amendment

[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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ALVIN F. LANGFELDT AND MARY LANGFELDT,

Petitioners,

v.

GENESIS MEDICAL CENTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF IOWA

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT PURSUANT TO RULE 29.6

Genesis Medical Center is a wholly owned subsidiary of Genesis Health System and there is no publicly held company owning 10% or more of the corporation's stock.

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STATEMENT OF THE CASE

Petitioners' Statement of the Case omits and misstates certain facts that are relevant to this Court's determination whether to issue a Writ of Certiorari. Petitioners are correct that the initial lawsuit against Respondent was dismissed without prejudice. However, Petitioners fail to mention that Respondent was not served with Original Notice of that suit until 117 days after the Petition was filed. Respondent subsequently moved to dismiss the initial lawsuit on the basis of untimely service pursuant to Iowa Rule of Civil Procedure 49. The District Court denied this first motion.

Petitioners also correctly point out that in a letter to Petitioners' counsel, dated January 29, 1999, Respondent's counsel did acknowledge receipt of the second Petition. However, Petitioners fail to mention that in that same letter, Respondent's counsel stated that "[u]ntil [he is] informed by Genesis that they have been served, obviously [he] will not be filing an answer."

Petitioners state the Respondent did not raise Iowa Rule of Civil Procedure 49(f), and its service requirements, until after mediation efforts regarding the second Petition were unsuccessful. This is quite simply wrong. Petitioners were put on notice of the service requirements of Rule 49(f) by Respondent's motion in the initial lawsuit and counsel's letter of January 29, 1999.

Petitioners further state that Rule 49(f) "directs the court to 'direct an alternate time or manner of service.'"[1] However, Petitioners' statement is wrong and their argument is misguided. Under Rule 49(f), the District Court's authority to direct an alternate time or manner of service is discretionary unless the failure to serve is deemed "presumptively abusive." Petitioners never attempted to effectuate service until 140 days after filing the second Petition; therefore, the District Court and the Iowa Court of Appeals properly concluded the Petitioners' failure to serve was presumptively abusive. Once the delay in service was deemed presumptively abusive, dismissal of the action was required unless Petitioners established adequate justification for the delay. *See Alvarez v. Meadow Lane Mall Limited Partnership*, 560 N.W.2d 588, 590 (Iowa 1997). Petitioners failed to demonstrate such adequate justification. Therefore, once the delay was deemed "presumptively abusive," any discretion allowed the District Court under Rule 49(f) ceased to exist.

Respondent never waived timely service of process and the Petitioners never sought to serve Respondent or sought an extension of this time period to complete service. Petitioners failed to establish adequate justification for their failure to timely effectuate service of process. Therefore, the

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[1] Ironically, Petitioners argued to the Iowa Supreme Court that the District Court's authority to direct an alternate time or manner of service was discretionary, not mandatory as they seem to argue now. *See* Application for Further Review, p. 6 ("Additionally, the District Court, had within it's discretion to direct an alternate time or manner of service pursuant to Iowa Rule of Civil Procedure 49(f).").

District Court properly granted Respondent's Motion to Dismiss because Petitioners "failed to show good cause for their failure to serve defendant in this action as required by amended Rule 49(f)." The Iowa Court of Appeals properly affirmed the dismissal and the Iowa Supreme Court properly declined further review.

REASONS FOR DENYING THE WRIT

Petitioners apparently argue that due process and equal protection rights under the Fourteenth Amendment of the U.S. Constitution require the issuance of a Writ of Certiorari. However, no constitutional issues, including due process and equal protection rights under the Fourteenth Amendment, were ever raised or argued in the Iowa District Court for Scott County, the Iowa Court of Appeals or the Iowa Supreme Court. Therefore, Petitioners' arguments have not been preserved for review and the Petition for Writ of Certiorari should be denied.

Notwithstanding Petitioners' failure to raise any constitutional arguments below, Petitioners have failed to raise any federal questions requiring review by this Court. Iowa Rule of Civil Procedure 49(f) is not in any manner unconstitutional. Petitioners were not denied access to the Iowa courts as they were allowed to file their action not once but twice. It was Petitioners' failure to adhere to the rules of the court that resulted in dismissal; not an arbitrary or capricious application of the rules as Petitioners argue.

When Petitioners filed their action, Iowa Rule of Civil Procedure 49(f) clearly required timely service of process upon Respondent and a failure to effectuate timely service, without "good cause," clearly mandated dismissal of the ac-

tion. Iowa courts had proper jurisdiction over this case and properly dismissed the action based upon Iowa Rule of Civil Procedure 49(f), a rule that exists in substance in most, if not all, jurisdictions of this country, including federal courts, and well-settled Iowa case law. Thus, the Petition for Writ of Certiorari should be denied.

I. CONSTITUTIONAL ARGUMENTS WERE NEITHER RAISED NOR ARGUED BELOW

Petitioners apparently argue that due process and equal protection rights under the Fourteenth Amendment of the U.S. Constitution require the issuance of a Writ of Certiorari. Supreme Court Rule 14 requires a Petition for Writ of Certiorari which seeks review of a state-court judgment to contain cites to the portions of the record where federal questions were raised.[2] Petitioners have failed to cite to any

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[2] Rule 14(g)(i) requires the Petition for Writ of Certiorari contain the following if review of a state court judgment is sought:

> ... specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (*e.g.*, court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of

portion of the record or rulings below where federal, or constitutional, questions were raised. This is because no constitutional issues, including due process and equal protection rights under the Fourteenth Amendment, were ever raised or argued in the Iowa District Court for Scott County, the Iowa Court of Appeals or the Iowa Supreme Court.

With very rare exceptions, in reviewing state court judgments under 28 U.S.C §1257, this Court will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision. *See Adams v. Robertson*, 520 U.S. 83, 117 S.Ct. 1028, 1029, 137 L.Ed.2d 203 (1997); *Webb v. Webb*, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 392, 400 (1981)("Because petitioner failed to raise her federal claim in the state proceedings and the Georgia Supreme Court failed to rule on a federal issue, we conclude that we are without jurisdiction in this case. Accordingly, the suit is dismissed for want of jurisdiction."); *Monks v. New Jersey*, 398 U.S. 71, 71, 90 S.Ct. 1563, 26 L.Ed.2d 54 (1970)("The further claim advanced by petitioner's appointed counsel in this Court... has been raised for the first time upon this writ and the state courts have had no opportunity to pass upon it. Accordingly we conclude that the writ of certiorari should be dismissed as improvidently granted...."); *Cardinale v. Louisiana*, 394 U.S. 437, 439, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969) ("In view of the petitioner's admitted failure to raise the issue he presents here in any way below, the failure of

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certiorari. When the portions of the record relied on under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph 1(i).

the state court to pass on this issue, the desirability of giving the State the first opportunity to apply its statute on an adequate record..., the writ is dismissed for want of jurisdiction."). The issues raised in the Petition for Writ of Certiorari were never raised, argued or addressed below by either the parties or the Iowa courts. The Petition should be denied accordingly.

II. THIS CASE DOES NOT INVOLVE ANY FEDERAL QUESTIONS REQUIRING REVIEW FROM THIS COURT

Notwithstanding Petitioners' failure to raise any constitutional arguments below, Petitioners have failed to raise any federal questions requiring review by this Court. Iowa Rule of Civil Procedure 49(f) is not in any manner unconstitutional. Most, if not all, jurisdictions in this country have a procedural rule similar, if not identical, to Iowa Rule of Civil Procedure 49(f). This includes the federal court system as Federal Rule of Civil Procedure 4(m) mandates dismissal for the failure to serve within 120 days unless "good cause" is demonstrated. See Fed. R. Civ. P. 4(m). Procedural rules which require service within a specified time have withstood constitutional challenge. *See, e.g., U.S. for Use and Benefit of DeLoss v. Kenner Gen. Contractors, Inc.*, 764 F.2d 707, 708 n.2 (9th Cir. 1985)("Rule 4(j)[now 4(m)] plainly meets the traditional rational basis test for judging an equal protection claim."; citation omitted); *Roberts v. Underwood*, 270 N.E.2d 547, 550 (Ill. App. Ct. 1971)("Plaintiffs also contend that the dismissal of their complaint violated their due process and equal protection rights under the Fourteenth Amendment of the United States Constitution. However,

plaintiffs cite no authority for this argument and we believe it is without merit."; citation omitted).

Petitioners argue that they were denied access to the courts. However, Petitioners were allowed to file their action not once but twice. It was Petitioners' failure to adhere to the rules of the court that resulted in dismissal, not any arbitrary application of the rules.

It is also argued that review is necessary because there "is a conflict between the states in applying procedural rules similar to Rule 49(f)." However, the application of procedural rules by other states, including Illinois, is irrelevant. Petitioners filed suit in Iowa. Iowa was the proper jurisdiction. Petitioners were bound by the Iowa Rules of Civil Procedure, not procedural rules found in other states.

Petitioners further argue that an alleged conflict in applying procedural rules results in uncertainty in the administration of justice. At the time Petitioners filed their action, the Iowa case law was clear that a failure to timely effectuate service, without adequate justification, would result in dismissal. *See Becker v. Becker*, 603 N.W.2d 627, 628 (Iowa 1999); *McCormick v. Meyer*, 582 N.W.2d 141, 145 (Iowa 1998)(reversing the district court's denial of motion to dismiss); *Mokhtarian v. GTE Midwest, Inc.*, 578 N.W.2d 666, 670 (Iowa 1998); *Henry v. Shober*, 566 N.W.2d 190, 193 (Iowa 1997); *Alvarez*, 560 N.W.2d at 591; *Dennis v. Christianson*, 482 N.W.2d 448, 451 (Iowa 1992); *Bean v. Midwest Battery & Metal, Inc.*, 449 N.W.2d 353, 356 (Iowa 1989); *Turnbull v. Horan*, 522 N.W.2d 860, 861 (Iowa Ct. App. 1994)(holding that the 126 day delay in service was presumptively abusive). Petitioners cannot now argue, in good

faith, that the consequences for failing to adhere to the requirements of Rule 49(f) were somehow uncertain.

Furthermore, Petitioners' "forum shopping" argument is irrelevant and a red herring. Petitioners filed suit in the only courts with proper jurisdiction; the Iowa state courts. Therefore, as stated earlier, they were bound by the Iowa Rules of Civil Procedure, including Rule 49(f). Speculation regarding possible adjudication in other states, including Illinois, is irrelevant as only Iowa, and not Illinois, had jurisdiction over this case.

Finally, Petitioners argue that the Iowa courts arbitrarily and capriciously dismissed their action. This is simply wrong. The Iowa courts relied on a long-standing rule of civil procedure and well-settled case law in dismissing Petitioners' action. *See* Iowa R. Civ. P. 49(f); *Mokhtarian*, 578 N.W.2d at 670; *Henry*, 566 N.W.2d at 193; *Alvarez*, 560 N.W.2d at 591; *Turnbull*, 522 N.W.2d at 861.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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